No. 349390

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

DARLENE JEVNE,

Appellant,

v.

THE PASS, LLC, a Washington limited liability company, d/b/a The Pass Life, and BRYCE PHILLIPS and JANE DOE PHILLIPS, husband and wife and their marital community

Respondent.

RESPONDENTS' / CROSS-APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

In accord with RAP 10.3(c), The Pass limits this reply to the following errors raised by The Pass on appeal: (1) the superior court's error in denying The Pass's Motion to Dismiss due to Jevne's lack of standing; and (2) the superior court's error in excluding the Public Works Correspondence and the Snoqualmie Inc. Email. Jevne continues to misstate the law, the facts, and The Pass's arguments on both these points. Jevne lacks standing because the claims alleged belong to Snoqualmie Inc., the owner of Tract A. Even if the HOA owns Tract A, as opposed to Snoqualmie Inc., Jevne's alleged interest in Tract A through the HOA is plainly contingent and insufficient to support standing. This Court should, therefore, reverse the superior court decision on the Motion to Dismiss and dismiss this suit for lack of standing. In the interest of resolving a long-simmering community dispute, this Court should also affirm the superior court's dismissal with prejudice of Jevne's claims on the merits. Further, and if the Court reaches the merits of the claims, the excluded evidence may be admitted because it is not precluded as extrinsic evidence or hearsay and further supports the superior court's decision.

II. REPLY ARGUMENT

A. The superior court erred in denying The Pass's Motion to Dismiss for lack of standing.

"The doctrine of standing generally prohibits a party from asserting another person's legal right." *Timberlane Homeowner's Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 307, 901 P.2d 1074 (1995). Furthermore, "[a] party has standing to raise an issue if it 'has a distinct and personal interest in the outcome of the case' [or] [s]tated another way, a party has standing if it demonstrates 'a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.'" *Id*., at 307-08 (internal citations omitted).

The proper party-in-interest with standing to bring Jevne's claims is the owner of Tract A, Snoqualmie Inc. In the alternative, even if the HOA owns Tract A, Jevne's sole purported interest in Tract A amounts to, at most, a tenuous contingent interest and she therefore still lacks standing to bring this action. Confronted with the plain mandate of the law and an absence of facts to support standing, Jevne now peppers the Court with an imaginative list of unsupported theories that are immaterial to standing.

Jevne failed to meet her burden to present a genuine issue of material fact, therefore, summary judgment dismissal for lack of standing is proper.

1. Jevne lacks standing because Snoqualmie Inc. owns Tract A and the claims alleged therefore belong to Snoqualmie Inc.

Snoqualmie Inc. is the owner of Tract A and, therefore, the proper party-in-interest to bring the claims alleged by Jevne. That Snoqualmie Inc. owns Tract A is supported by RCW 64.04.010 governing the conveyance of real property by deed, RCW 58.17.165 governing dedications of land pursuant to a plat, and the record. RCW 64.04.010 requires "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 58.17.165, titled "Certificate giving description and statement of owners must accompany final plat—Dedication, certificate requirements if plat contains—Waiver", likewise requires a clear donation, dedication or grant to be stated above the notarized signature of the owners:

> Every final plat … must contain a certificate giving a full and correct description of the lands divided as they appear on the plat or short plat, including a statement that the subdivision… has been made with the free consent in accordance with the desires of the owner or owners.
>
> If the plat or short plat is subject to dedication, the certificate or a separate written instrument shall contain the dedication of all streets and other areas to the public, and

> individual or individuals, religious society or societies or to any corporation, public or private as shown on the plat… Said certificate or instrument of dedication shall be signed and acknowledged before a notary public by all parties having any ownership interest in the lands subdivided and recorded as part of the final plat.
>
> …
>
> Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee..."

RCW 58.17.165. Jevne has not presented any evidence that Snoqualmie Inc. deeded, dedicated, or otherwise conveyed Tract A to the HOA in satisfaction of either of these statutes governing conveyances. In contrast, the 1990 Plat, the 2012 Plat, and the Title Report prepared by First American Title Insurance Company, all confirm Snoqualmie Inc. still owns Tract A. CP 432 (1990 Plat); 519-21 (2012 Plat); 500-01 (Title Report).

As required by RCW 58.17.165, the 1990 Plat includes the signatures of Snoqualmie Inc. and Westop Inc. as the owners of all of the lands encompassed in the 1990 Plat, including Tract A. CP 432 (1990 Plat). Also as required by RCW 58.17.165, Snoqualmie Inc. and Westop Inc. expressly detailed any and all dedications made in connection with the 1990 Plat, and signed and notarized this "Dedication" certificate. CP 432 (1990 Plat). Notably absent from the Dedication certificate is any dedication of Tract A to the HOA or any other entity or person—indeed

no such dedication was made. *Id.* Jevne misstates The Pass's argument on this point as an issue of proper notarization of the 1990 Plat. Response Br. of Appellant, p. 4-5. The Pass has never asserted the 1990 Plat was not notarized. To the contrary, the 1990 Plat simply does not dedicate Tract A to the HOA or any other entity because no such dedication is listed in the express Dedication certificate on sheet 3. CP 432 (1990 Plat). As noted by Jevne, "the lack of an express term with the inclusion of other similar terms is evidence of the drafter's intent." Response Br. of Appellant, p. 9 (*citing Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965)). If Snoqualmie Inc. had intended to dedicate Tract A to the HOA, it would have done so in the statutorily required Dedication certificate, but it did not. *See* RCW 58.17.165.

Jevne chiefly relies on the "Tract Designation" table on the 1990 Plat that describes the uses and ownership of Tract A as "stormwater detention facilities" and "Homeowner's Association." CP 430 (1990 Plat). This Tract Designation table does not contain any words of conveyance and is legally insufficient to effect a conveyance pursuant to the dedication requirements of RCW 58.17.165 or the deed requirements of RCW 64.04.010. CP 430 (1990 Plat).

Adding to the weight of 1990 Plat, the County-approved 2012 Plat correctly identifies Tract A, Parcel 302436, as being owned by

Snoqualmie Inc. CP 519-21 (2012 Plat). Specifically, sheet 1 of the 2012 Plat identifies Tract A as Parcel 302436 and sheet 3 identifies Snoqualmie Inc. as the owner of said Parcel. *Id*. That no conveyance was effectuated is further confirmed by the Title Report prepared by First American Title Insurance Company, a reputable third-party institution. The Title Report confirms Snoqualmie Inc. acquired complete title from Westop Inc. and remains the owner of Tract A. CP 500-01 (Title Report), ¶ 3.

a. The superior court did not infer the HOA owns Tract A.

In response, Jevne now argues "[t]he trial court inferred that Jevne's HOA was the owner of Tract" because "[t]he only logical conclusion to make from the trial court's decision upholding Jevne's standing is that Jevne's HOA was the owner of Tract A pursuant to RCW 58.17.165, not Snoqualmie Summit Inn, Inc." Response Br. of Appellant, p. 2. Jevne mischaracterizes basic legal principles of summary judgment and egregiously misstates the ruling of the superior court. The superior court clearly, and repeatedly, articulated its ruling on standing as "I'm going to find there's genuine issue of material fact as to whether or not there – she has an ownership interest and is entitled to bring this action", and further as "I don't find – I'm not convinced that's a dedication on the – on the face sheet of that --- of that plat. The dedication is exactly as

pointed out on Page 3 to the public areas… But that articles of incorporation – again, I question – it appears to this Court that that may give an owner the right to do what she is doing. VRP 3:11-13; 4:11-5:1 (Verbatim Transcript of Oral Ruling) (emphasis added).

Although this ruling was improper, it correctly articulates the summary judgment standard as precluding dismissal where the court determines there may be a genuine issue of material fact. CR 56(e); *Island Air v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). The ruling also reveals that contrary to Jevne's bold misstatement to this Court, the superior court actually refused to find that Tract A was dedicated to the HOA. VRP 4:11-5:1 (Verbatim Transcript of Oral Ruling). For all of these reasons, Jevne's inference argument is meritless and should be disregarded. The only "logical conclusion" based on the superior court's ruling is that after considering all of the evidence in favor of Jevne, the court reluctantly concluded Jevne may have an ownership interest in Tract A as a result of the dissolution provision in the HOA's Articles of Incorporation, the merits of which are addressed below.

b. The Assessor Printout is not evidence of ownership.

Jevne also urges this Court to disregard the Title Report and instead rely on the Assessor Printout as evidence of the HOA's alleged

ownership of Tract A. Response Br. of Appellant, p. 2-3; CP 41.[1] As already detailed for the Court, the Assessor Printout is a suspect piece of evidence directly manipulated by counsel for Jevne. Reply Br. of Resp'ts, p. 21; CP 347, ¶ 5. In contrast, the Title Report was prepared by a reputable third-party without undue influence. CP 500-01 (Title Report). The credibility of the Title Report is evidenced by the fact that a title report is the statutorily mandated tool used to establish ownership of real property. *See e.g.*, RCW 58.17.165 (requiring "every plat containing a dedication filed for record must be accompanied by a title report confirming that the title of the lands as described and shown on said plat is in the same name of the owners signing the certificate or instrument of dedication.").

Jevne now utilizes the Assessor Printout to also suggest that the HOA's alleged ownership of Tract A "has gone unopposed by the Pass, LLC's alleged owner, Snoqualmie Summit Inn, Inc. to date." Response Br. of Appellant, p. 3. In making this giant leap and preposterous inference, Jevne fails to provide any authority or argument as to why a purported lack of opposition is legally significant—indeed, it is not. Jevne also fails to cite to any fact in the record evidencing such lack of

[1] Jevne cites CP 152 for the Assessor Printout, but The Pass notes that for the Court's ease of review, the same document in a more legible format is located at CP 41.

opposition, likely because no such fact exists and any suggestion it does is patently false. This red herring issue is immaterial to the Court's decision.

Jevne also now argues that the Assessor Printout shows that Snoqualmie Inc. did not pay property taxes for Tract A and this somehow means that the County assesses tax on Tract A to the HOA, and its members, and therefore this is evidence that the HOA owns Tract A. Response Br. of Appellant, p. 3. Jevne is wrong. The only information the tax data conveys is that the County assigns zero value to Tract A, meaning there are no taxes due or payable by anyone. CP 41 (Assessor Printout). Furthermore, although it is often true that an owner of real property is in fact also the real property taxpayer for that property, ownership is not a requirement to pay taxes on a property and taxpayer status is not tantamount to fee title ownership. *See e.g.*, WAC 458-12-360 (defining "taxpayer" as "the person charged, or whose property is charged, with property tax and whose name appears on the most recent tax roll or has been otherwise provided to the assessor") (emphasis added). Therefore, while there is no indication that the HOA is paying taxes associated with Tract A, even if such evidence existed, it would not legally denote ownership of Tract A.

The evidence shows that Snoqualmie Inc. owns Tract A, therefore the claims alleged belong to Snoqualmie Inc. and Jevne's efforts to usurp

these claims should be dismissed for lack of standing. *Timberlane*, 79 Wn. App. at 307.

2. Jevne lacks standing even if the HOA owns Tract A.

In the event this Court concludes the HOA owns or may own Tract A, Jevne still lacks standing to pursue the claims alleged because such claims would belong to the HOA alone. Again, a party has standing if it demonstrates "a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted." *Timberlane*, 79 Wn. App. at 307-08 (internal citations omitted). Jevne continues to rely on a dissolution provision in the HOA's Articles of Incorporation and *Schroeder v. Meridian Imp. Club* as support for her alleged interest in Tract A through the HOA. Response Br. of Appellant, p. 5. However, Jevne has yet to address the glaring factual distinctions of *Schroeder* and the resulting clear contingent nature of her alleged dissolution interest.

Jevne alleges her interest arises from the following dissolution provision of the HOA's Articles of Incorporation:

> In the event of the dissolution or liquidation of the corporation, the assets of the corporation shall be distributed as provided by Chapter 24.03 of the Revised Code of Washington, and any assets remaining after all the liabilities and obligations of the corporation shall be been

> paid, satisfied, discharged, or other adequate provision made therefor, shall be distributed, either in cash or in kind, among all of the members of the corporation who are members in good standing on the date a resolution providing for dissolution or liquidation is adopted by the members of the corporation, and in proportion to the votes each member is entitled to cast under the Bylaws.

CP 338 (Articles of Incorporation), §8.4 (emphasis added); VRP at 3:11-5:1 (Verbatim Transcript of Oral Ruling); Br. of Appellant, p. 16-18. Under this provision and in order for Jevne to obtain an interest generated from Tract A, the following would have to occur: the HOA would need to dissolve; the HOA would need to own Tract A; the HOA would need to sell Tract A; the HOA would need to pay off all of its debts; the HOA would need to have proceeds remaining for distribution to its members; and Jevne would still need to own Lot 31 and be a member in good standing. In response, Jevne presents the circular argument that the inclusion of a dissolution provision in the Washington Nonprofit Corporation Act is somehow evidence of a foreseeable likelihood of the HOA's dissolution. Response Br. of Appellant, p. 2. The statutory acknowledgement that sometimes associations dissolve is evidence of nothing and foreseeability is not the law. Jevne must have "a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest." *Timberlane*, 79 Wn. App. at 307-08 (internal citations omitted). Jevne's expectant hope that her multi-step

hypothetical occurs at some unknown time in the future is the very definition of a contingent interest. Jevne's hypothetical, contingent interest is insufficient to support standing.

To resolve the contingent nature of this dissolution interest, Jevne relies on *Schroeder*. *Schroeder v. Meridian Imp. Club*, 36 Wn.2d 925, 930, 221 P.2d 544 (1950); *see also* Br. of Resp't, p. 23-24. *Schroeder* is inapposite to the present case. The issue in *Schroeder* was whether plaintiffs had standing to unwind the sale of an association's property even though plaintiffs were not members of the association at the time it decided to dissolve and sell the property. *Schroeder*, 36 Wn.2d at 928-29. The court answered in the negative and held the plaintiffs did not have standing. *Id*. at 934. Not only was the issue before the *Schroeder* court different, but so were the facts. The association had actually dissolved and sold association-owned property, thereby triggering distribution requirements to its members as required by its governing documents. *Id*. To date, Jevne has not accounted for these factual distinctions.

In sum, *Schroeder* decided a different issue related to standing, concluded the plaintiffs had no standing, the facts were different from the present case, Jevne has not addressed these factual differences, and for all of these reasons *Schroeder* is inapposite to the present case. *Schroeder* is simply not the solution to Jevne's lack of standing problem. Irrespective

of *Schroeder* and whether the HOA or Snoqualmie Inc. owns Tract A, Jevne does not have standing to pursue the alleged claims as a matter of law. This suit should therefore be dismissed.

Jevne's argument that she has a "second present interest" in Tract A similarly fails to establish standing. Response Br. of Appellant, p. 6. Instead, this argument confirms the core of The Pass's argument on the merits of this case. Every plat must assure drainage for all property within the borders of the plat. RCW 58.17.110; *Westside Bus. Park v. Pierce Cy.*, 100 Wn. App. 599, 607, 5 P.3d 713 (2000). Accordingly, and as shown on the 1990 Plat, Tract A is an integral component to assuring that Tract E, now developed by The Pass, will have proper drainage. Indeed, substituting "The Pass" for all references to "Jevne" made in Jevne's argument on page 6 of her Response Brief demonstrates The Pass's fundamental point: use of the stormwater pond in Tract A is shared by all properties within the 1990 Plat. No one property owner has standing to compromise another owner's interest in the integral components of the 1990 Plat's drainage system.

B. The superior court erred in excluding the Public Works Correspondence and Snoqualmie Inc. Email from the record.

As already thoroughly briefed for the Court, The Pass prevails in this suit based solely on the 1990 Plat and no other evidence is needed to

prove that Jevne lacks standing and her claims are without merit. Nonetheless, ample additional evidence exists to support The Pass's position and all of this evidence should be considered by the Court.

Jevne continues to assert that the Public Works Correspondences are inadmissible because they are allegedly extrinsic evidence that contradict the 1990 Plat. The Public Works Correspondences consist of a letter from Public Works to Bryce Phillips, Manager of The Pass, ("**Public Works/Pass Letter**") and an email exchange between Public Works and members of the HOA ("**Public Works/HOA Email**"). These pieces of evidence supplement and affirm the 1990 Plat, not contradict it. As previously briefed for the Court, outside evidence is admissible to clarify the 1990 Plat and "illuminate" the intention of the parties. Reply Br. of Resp'ts, p. 26-27; RCW 58.17.110; *Westside Bus. Park*, 100 Wn. App. at 607; *Olson Land Co. v. City of Seattle,* 76 Wn. 142, 144-45, 136 P. 118 (1913); *Wimberly v. Caravello*, 136 Wn. App. 327, 336-37, 149 P.3d 402 (2006). Both the Public Works/Pass Letter and the Public Works/HOA Email confirm the 1990 Plat and the Detention Pond were designed to provide for drainage from Tract E's future development to the Detention Pond within Tract A. CP 470-497 (Public Works Correspondences).

Jevne also asserts that the Public Works Correspondences and the Snoqualmie Inc. Email are inadmissible hearsay. Response Br. of

Appellant, p. 13-14. In support of her hearsay arguments, Jevne makes one citation to ER 801 and provides no substantive argument or other authority. ER 801 contains the definitions related to the hearsay rule. For the sake of argument and assuming counsel meant to cite ER 802, which articulates the hearsay rule, the Public Works/Pass Letter and the Snoqualmie Inc. Email, consisting of an email from Snoqualmie Inc. to Bryce Phillips, are nonetheless admissible under the business records of regularly conducted activity exception. ER 803(a)(6); RCW 5.45.020; CP 470, 524. Both communications were sent in the normal course of business to Bryce Phillips in his capacity as Manager of The Pass and they are therefore admissible.

Jevne also argues, without citing authority, that the Snoqualmie Inc. Email is inadmissible because it relates to the issue of permission and permission is a moot issue. Response Br. of Appellant, p. 14. The Pass offers the Snoqualmie Inc. Email as evidence of permission from the owner of Tract A, Snoqualmie Inc., to The Pass to act in the manner that led to this lawsuit. As thoroughly argued throughout every stage of this litigation, such permission is not needed to defeat Jevne's claims, but the fact that The Pass obtained permission further defeats Jevne's claims. As evidence of additional grounds to dismiss this litigation, permission is not moot and the Snoqualmie Inc. Email is admissible.

Again, neither the Public Works Correspondences nor the Snoqualmie Inc. Email are necessary to support the dismissal of Jevne's claims. However, the Public Works Correspondence to The Pass and the Snoqualmie Inc. Email do not constitute hearsay or extrinsic evidence contradicting the 1990 Plat, and such evidence is therefore admissible. The superior court erred in excluding this evidence and it should be admitted for this Court's consideration.

III. CONCLUSION

The superior court erred in denying The Pass's Motion to Dismiss due to Jevne's lack of standing and in excluding the Public Works Correspondence and the Snoqualmie Inc. Email. Jevne lacks standing because the claims alleged belong to Snoqualmie Inc., the owner of Tract A. In the alternative, even if the Court concludes the HOA owns Tract A, Jevne's alleged interest is contingent and insufficient to support standing. The Pass respectfully requests this Court reverse the superior court and dismiss this suit with prejudice for lack of standing.

The Pass also respectfully requests that even if this Court dismisses this suit for lack of standing, the Court also affirm the superior court's dismissal of Jevne's claims on the merits with prejudice. This litigation impacts every lot owner within The Pass Life as development of their community is stalled. It also impacts the owners of lots in the adjacent

development as these owners are continuously threatened with litigation by counsel for Jevne if they act in any manner that influences the outcome of this litigation. The numerous individuals touched by this litigation would greatly benefit from the finality of a decision on the merits. Lastly, and should the Court reach the merits, the excluded evidence should be admitted because it is not precluded as extrinsic evidence or hearsay.

DATED this 10th day of August, 2017.

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I, Kristi Beckham, certify under penalty of perjury of the laws of the State of Washington that on August 10, 2017, I caused a copy of the document to which this is attached to be served on the following individual(s) via the methods indicated below:

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August 10, 2017 - 2:39 PM

Transmittal Information

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Superior Court Case Number:	15-2-00352-9

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